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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Decided on: 25th April, 2019.

\+ W.P.(C) 13969/2018 & CM Appl. 54689/2018

REACH DREDGING LTD ..... Petitioner

Through: Mr. Rohit Dutta, Adv.

versus

UNION OF INDIA & ORS. ..... Respondents

Through: Mr. Bhagvan Swarup Shukla, CGSC with Mr. Sarvan Kumar, Adv. for UOI.
Mr. Kapil Gupta & Ms. Muskan Gupta, Advs. for R-2 & 3.
Mr. Yashraj Singh Deora, Ms.Sonal Mashankar & Mr. Neeraj Jain, Advs. for R-5 to 7.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE PRATEEK JALAN

S. RAVINDRA BHAT, J. (ORAL)

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1. WAPCOS Limited [herein referred to as second respondent/ WAPCOS] issued a Notice Inviting Tender on 10.11.2018, inviting applications from eligible entities to compete for the work of "Dredging and Reclamation" at Chilwa Taal, Gorkahpur, Uttar Pradesh. The petitioner, [a joint venture entity, constituted by an agreement dated 01.11.2018], furnished its bid. The petitioner was declared as eligible in the technical evaluation process on 30.11.2018. The bidding process entered the second stage when the financial bids were evaluated; the petitioner's bid was ₹ 37,92,59,500; it was placed at L-2. The consortium comprising of

respondent nos. 5 to 7, were declared to be L-1 as their bid was lower than that of the petitioner. In these circumstances, the petitioner in the present proceedings under Article 226 of the Constitution, essentially complains that the L-1 tenderer was ineligible and should not have been permitted to participate in the tender process itself.

2. Since the question of eligibility is involved in this case, it would be relevant to set out the relevant eligibility condition in the NIT:-

Format of Check List				
S.N	*Particular of Document*	*Yes*	*No*	*Page Nos. (from-to)*
xxxx	*xxxx*	*xxxx*		
e)	*Yearly sales Turnover and Audited Balance Sheet for Last 5 (five) years ending on the financial year 2017-18*			
	• *The bidder/ (Each partners in case of JV) should not have incurred any loss (profit after tax should be positive) in last two years during last five years ending 2017-18 duly audited and* ***<u>Attested by the independent Chartered Accountant.</u> (Form-A)***			
	1) ***Turnover:*** *Average Annual financial turnover of bidder /* ***(in case of JV, the combined turnover)*** *during the last 3 years ending 31st March* ***2018*** *should be at least* ***Rs.25 crores in the similar work*** • *This should be duly audited by the Chartered Accountant doing Statutory Audit.*			
	• *Full Balance Sheet and Profit & loss Statement of Bidder should be verified by Chartered Accountant*			

	• ***The contractor should also have satisfactorily completed the similar types of works as mentioned below during the last seven years ending previous day of last date of submission of tender. (Annexure-III).*** ***Bidder/ (Combined JV partners in case of JV) should have sufficient experience and establishment, expertise, specialization, and infrastructure facility(s) available with expertise logistic support etc. in the field of Earth work and Dredging activity in Wet lands/ dry lands in Ports/Harbours/Rivers/Lakes by deploying suitable men and machinery and having completed either of the following similar works during last seven years ending 31 March 2018, as mentioned below:-*** ***a. Three similar* completed works costing not less than the 40% of cost during last 7 years.*** ***b. Two similar* completed works costing not less than 60% of cost during last 7 years.*** ***c. One similar* completed work costing not less than 80% of cost during last 7 years.*** • **Similar Works means Earth work and Dredging activity in wetland/dry land in rivers, sea, lakes, backwaters, ports etc and Construction of Dykes/reclamation bunds etc*			
	• *The firm should own minimum two Nos Cutter Suction Dredger with output of each CSD of not less than 300 solid output per hour, Amphibious hydraulic excavator, Hydraulic Excavator with long boom, Hydraulic Excavator with short boom, loaders, Tippers/dumpers.*			

	Dredgers should be owned and not be allowed to be on charter or hire • *A list of Dredgers and ancillary crafts proposed to deploy for carrying out the subject work along with the specification & condition and present place of availability to be furnished. The proposed dredgers/equipment should be of Standard make/builders* • *Dredgers should be owned and not be allowed to be on charter or hire. Documentary evidence of ownership shall be submitted along with the bid.* • *A undertaking that the proposed Dredgers & Ancillary crafts can be mobilized within 30 days from the date of LOI (Annexure-II)* • *The firm should have a team of Good, experienced & professional persons for executing the subject work and their CV's should be furnished*			
f)	*The **bidder/ (each partner in case of JV)** should not be insolvent, in receivership, bankrupt or being wound up, not have had their business activities suspended. Accordingly, any one of the Bidders of the Joint Venture shall submit Solvency certificate with details of Financial Status i.e. Name of the Banker & Current Solvency from Banker for a sum of at least 40% of the estimated cost of work Certificate in Original. **The Solvency Certificate shall be issued by the bank after the date of publishing of Tender document.***			

3. The main complaint in these proceedings is that the L-1 tenderer does not fulfill both the turnover and the technical eligibility criteria as it did not

perform similar works of the value called for in the process. WAPCOS, in reply to the petitioner's contention, states *inter alia* as follows:-

> *"13. I further state that the last ground stated by the Petitioner is that the consortium of Respondent Nos. 5 to 7 does not have the requisite experience as detailed in NIT. In this regard it is submitted that they have the requisite experience, whereby they have submitted the certificates showing that they have worked at Soda Ash Plant for M/s Rohit Surfactants Private Limited (RSPL) and carried out Earthwork in Excavation & filling in embankment in reservoir, canal, disposal chamber using watering & mechanical consolidation among major earthwork & RCC work of intake pump house, disposal chamber, canal & foundation cum building work for a sum of Rs.69.38 crores. They also have also carried out Construction of Ashe Dyke & Diversion of Nallah at Mega Power Plant for M/s Coastal Gujarat Power Limited for a sum of Rs.31.50 crores (approx.). They have also carried out Dredging work for M/s Inland Waterways Authority of India on Alaknanda & Mahananda rivers for total contractual amount of Rs. 15.22 crores & on Tapi & Tizu rivers for total contractual amount Rs. 15.69 cores. This in turn shows that the consortium of Respondent Nos. 5 to 7 have requisite experience as was stipulated in NIT.*"

4. This Court is of the opinion that the petitioner's ground of challenge cannot be accepted. The fact that the petitioner consortium was technically entitled to compete *ipso facto* did not confer upon it a greater advantage than other competitors. The petitioner's endeavor was to primarily state, that the experience revealed by the L-1 tenderer did not measure up to the tender specifications vis-a-vis the eligibility conditions. It is stated that the successful tenderer consortium did not have the requisite experience or expertise or infrastructure facilities in the ports, harbors, rivers or lakes.

5. In this regard, the Court is of the opinion that WAPCOS, as the primary agency, which evolved the tender criteria has the right and duty to interpret it having regard to its requirement. Given the limited nature of

enquiry that Courts are afforded under Article 226 of the Constitution, unless the primary interpretation adopted by the public agency is palpably unreasonable, or yields such results that no reasonable entity or instrumentality would have arrived at such an interpretation, given the same set of facts, the Court would rarely interfere. [See *Michigan Rubber (India) Ltd. vs. State of Karnataka* (2012) 8 SCC 216 and *Afcons Infrastructure Ltd. vs. Nagpur Metro Rail Corporation Ltd.* (2016) 16 SCC 818]. Having regard to these considerations, the Court is of the opinion that the nature of experience revealed by the successful L-1 tenderer and the acceptance of the experience to declare the successful consortium as L-1 tenderer, is neither arbitrary nor unreasonable. As regards to the eligibility criteria with respect to the completion of similar works, it is undisputed that the value of the tendered work was ₹50 crores. Thus, the eligibility criteria could be fulfilled by three similar works of at least ₹20 crores each or two similar works of at least ₹30 crores each, or one similar work of at least ₹40 crores. The affidavit filed by WAPCOS shows that the successful bidder complied with both the second and third option. The acceptance of its bid by WAPCOS, in the opinion of the Court, is neither erroneous nor unreasonable.

6. In view of the foregoing decision, there is no merit in the writ petition. The same is hereby dismissed.

S. RAVINDRA BHAT,J.

PRATEEK JALAN,J.

APRIL 25, 2019

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